

1511580 (Migration) [2016] AATA 4494 (10 October 2016)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Saar Hassam Amara
VISA APPLICANT:	Mrs Rawan Ghanim Hashim Hashim
CASE NUMBER:	1511580
DIBP REFERENCE(S):	BCC2015/1698998
MEMBER:	Kira Raif
DATE:	10 October 2016
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 10 October 2016 at 10:49am

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 23 July 2015 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant is a national of Iraq, born in June 1997. She applied for the visa on 14 June 2015 on the basis of her relationship with the sponsor. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211 and cl. 309.221 because the delegate found the marriage between the applicant and the sponsor was invalid and the delegate was not satisfied they were in a de facto relationship. The sponsor ('the review applicant') seeks review of the delegate's decision.
3. The review applicant appeared before the Tribunal on 10 October 2016 to give evidence and present arguments. The Tribunal also received oral evidence from the review applicant's brother. The review applicant was represented in relation to the review by his registered migration agent. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

RELEVANT LAW

4. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
5. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act: s.5F(2) (a).
6. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).

ARE THE PARTIES VALIDLY MARRIED?

7. The review applicant provided to the Tribunal a copy of the primary decision record. It indicates the visa applicant was born on 7 June 1997. The parties registered their marriage on 19 January 2015. The Tribunal finds that the visa applicant was 17 years of age at the time she registered marriage with the sponsor.
8. The Tribunal must consider the review applicant's domicile for the purpose of s 88D of the *Marriage Act 1961*. Section 7 of the *Domicile Act 1982* provides that the domicile a person has at any time continues until he/she acquires a different domicile. Section 10 of the *Domicile Act 1982* provides that an intention for domicile of choice is the intention to make his/her home indefinitely in that country.

9. The marriage certificate refers to the review applicant's address in Australia. The review applicant's Australian passport and citizenship certificates were provided with the application. On form 40 the review applicant stated his residential address as an address in NSW, Australia. The review applicant confirmed in oral evidence to the Tribunal that he travelled to Australia in 2005 as a permanent resident. He said that since entering Australia, he travelled to Iraq and China for work but spent a few weeks overseas at a time. The review applicant referred to his family and business links in Australia.
10. The Tribunal finds that the review applicant has been living in Australia since 2005, that he has established residence in Australia and made Australia his home and had every intention of living in Australia. Although he informed the Tribunal that he planned to live in Iraq with the visa applicant, his evidence is that the circumstances had changed and he had not done that. The Tribunal finds, having regard to the review applicant's evidence, that he was domiciled in Australia at the time when the marriage took place in 2015.
11. Section 88D of the *Marriage Act 1961* defines a valid marriage and s 88E provides for some exceptions. Section 12 of the Migration Act provides that for the purpose of deciding whether a marriage is to be recognised as valid for the purposes of this Act, Part VA of the *Marriage Act 1961* applies as if section 88E of that Act were omitted. Section 88D relevantly states that a marriage shall not be recognised as valid where one of the parties was, at the time of the marriage, domiciled in Australia and either of the parties was not of marriageable age within the meaning of Part II. Section 11 of the Marriage Act provides that, subject to s 12 which is not relevant for present purposes, a person is of marriageable age if the person has attained the age of 18 years.
12. The Tribunal found that the review applicant was domiciled in Australia at the time of the marriage. The Tribunal finds that the visa applicant was 17 years of age at the time of the marriage and was not 'of marriageable age' within the meaning of Part II of the *Marriage Act*. Therefore the marriage between the visa applicant and the review applicant was not a valid marriage under the *Marriage Act 1961*.
13. The review applicant provided to the Tribunal a statement from the visa applicant's mother confirming that the marriage had been approved. The Tribunal acknowledges that the marriage was entered into voluntarily and has the approval of family and others. However, that does not alter the fact that the visa applicant was under the age of 18 at the time the marriage was registered. The review applicant also explained to the Tribunal that he initially planned to marry later and spend time with the visa applicant in Iraq to get to know her better but later the circumstances changed and they decided to get married. Again, that does not alter the fact that the visa applicant was under the marriageable age at the time the marriage was registered.
14. The Tribunal finds that the visa applicant and the review applicant were not married to each other under a marriage that is recognised as valid for the purpose of the Migration Act. The Tribunal finds that the visa applicant does not meet s. 5F(2)(a).

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

15. As the visa applicant and review applicant are not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).

16. Regulation 2.03A provides that a person claiming to be in a de facto relationship must be at least 18 and the person with whom the applicant claims to be in a de facto relationship must be at least 18. At the time the application was made, when the parties claim to be in a de facto relationship (in the absence of a valid marriage), both the visa applicant and the review applicant had turned 18. They meet r. 2.03A(2). However, r. 2.03A(3) requires such a relationship to have been in existence for at least 12 months ending immediately before the date of the application, unless the applicant can establish compelling and compassionate circumstances for the grant of the visa.
17. The visa applicant was not 18 years of age until about one week before the application for the visa was made and the Tribunal finds that she would be unable to meet r. 2.03A(2) until she turned 18 shortly before the date of the application. The Tribunal finds that the parties were not in a de facto relationship until the visa applicant turned 18 and they were not in a de facto relationship for the period of 12 months before the date of the application.
18. Further, the review applicant's oral evidence to the Tribunal is that he and the visa applicant formed a committed relationship in late 2014 and had an engagement around October or November 2014. The Tribunal finds that, at best, this was the date when the parties formed a mutual commitment to a shared life and a genuine and continuing relationship and that was less than 12 months before the application for the visa was made. The Tribunal is not satisfied that for the period of 12 months ending immediately before the date of the application, the applicant and the sponsor had a mutual commitment to a shared life and were in a genuine and continuing relationship. The Tribunal is not satisfied the visa applicant meets r. 2.03A(3).
19. The Tribunal has considered whether there are compelling and compassionate circumstances for the grant of the visa, for the purpose of r. 2.03A(3). The review applicant's evidence to the Tribunal is that he and the visa applicant are in a close and loving relationship and speak to each other daily and cannot live without each other. The review applicant explained to the Tribunal the reasons they registered marriage earlier than initially planned. The Tribunal is prepared to accept, for the purpose of this application, that the couple are in a genuine and committed relationship and want to be together. However, in the Tribunal's view, that is the basis on which this application is made but no more. The Tribunal is not satisfied that the existence of a genuine and committed relationship is a compelling and compassionate reason for the grant of the visa.
20. The review applicant told the Tribunal that he needs his wife in Australia to look after him and they want to get on with their lives. The Tribunal acknowledges that evidence but finds there is nothing compelling and compassionate about such desire.
21. The review applicant informed the Tribunal that the level of insecurity in Iraq has increased, particularly because the visa applicant is married to a person who lives overseas. He claims that the visa applicant's father is an MP and his situation is now worse. However, the review applicant earlier told the Tribunal that the visa applicant's family situation was safe to the extent that he was planning to relocate to Iraq in 2013 and live with her family. The Tribunal has found the review applicant's evidence contradictory. While he initially stated that the visa applicant's family was safe, partly due to the father's political affiliations, he subsequently claimed that it was not safe for the family and the security has worsened. The applicant referred to the recent bombings in Iraq but in the Tribunal's view, such bombings would have also existed in 2013 when he claims the security situation for the family was good. The review applicant presented no documentary evidence to indicate that the situation for the visa applicant's family is unsafe or has worsened and the Tribunal is not prepared to accept his assertions without probative evidence. The Tribunal is not satisfied on the evidence before it that the security situation for the visa applicant is poor or has deteriorated. The

Tribunal is not satisfied such matters give rise to compelling and compassionate circumstances for the grant of the visa.

22. The review applicant said that he has not seen his wife for a number of years and she is not willing to travel to a third country to meet him. The Tribunal acknowledges that the parties had not seen each other for some time but in the Tribunal's view, that in itself is not sufficient to establish compassionate and compelling circumstances for visa grant. The applicant claims that he is running a business in Australia and has various commitments. The Tribunal accepts that evidence but also does not find that compassionate and compelling for the grant of the Partner visa.
23. Having considered the circumstances singularly and cumulatively, the Tribunal is not satisfied that the applicant has established compelling and compassionate circumstances for the grant of the visa. The Tribunal is not satisfied the requirements of r. 2.03(3) are met. There is no evidence before the Tribunal to indicate that the sponsor is, or was the holder of a permanent humanitarian visa and that before such visa was granted or the application for it was made, there was a de facto relationship between the applicant and the sponsor. In particular, the review applicant's evidence to the Tribunal is that he was granted the Australian visa in 2005 and his relationship with the visa applicant commenced around 2014. The visa applicant does not meet r. 2.03(4). There is no evidence that the relationship is registered under a law or a State or Territory as prescribed. The visa applicant does not meet r. 2.03A(5).
24. The Tribunal has found that the marriage between the visa applicant and the sponsor is not valid. The Tribunal has found that the couple did not have a mutual commitment to a shared life as husband and wife and a genuine and continuing relationship for the period of 12 months immediately preceding the date of the application. The Tribunal has found that there are no compelling and compassionate circumstances for the grant of the visa. The Tribunal finds that the visa applicant does not meet r. 2.03A. The Tribunal is not satisfied that the visa applicant was the spouse or the de facto partner of the sponsor at the time the application was made. There is no evidence of the couple's intention to marry. The Tribunal finds that the visa applicant does not meet cl. 309.211.

CONCLUSION

25. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

DECISION

26. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Kira Raif
Senior Member